Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)))))))	MB Docket No. 05-311

REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by undersigned counsel, hereby submits its reply comments in response to the Commission's Further Notice of Proposed Rulemaking ("Further Notice") and the initial comments filed in response thereto.[1] With the exception of local franchise authorities and their association ("LFAs") and AT&T, all of the commenters, including "new entrant" Verizon, support the Commission's tentative conclusion[2] that the findings in the *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewals of those agreements with LFAs.[3] As shown by RCN and these other commenters, there is no basis whatsoever for permitting the competitive disparity created by the *Order* to continue past the time that an existing franchise is being renewed. To do otherwise would turn the Commission's effort to promote competition on its head and have precisely the opposite effect

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1 *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 06-180 (Mar. 5,2007) *("Order").*

2 *Id.* at ¶ 140.

3 *See, e.g.*, Comments of Charter Communications, Inc., MB Docket 05-311 (Apr. 20,2007) ("Charter Comments"); Comments of Fiber-to-the-Home Council, MB Docket 05-311 (Apr. 20, 2007) ("FTTH Comments"); Comments of National Cable & Telecommunications Association, MB Docket 05-311 (Apr. 20, 2007) ("NCTA Comments"); Comments of Time Warner Cable Inc., MB Docket 05-311 (Apr. 20,2007) ("TWC Comments"); Comments of WideOpenWest Finance ("WOW"), MB Docket 05-311 (April 20,2007) ("WOW Comments"); Comments of Verizon, MB Docket 05-311 (Apr. 20,2007) ("Verizon Comments"); Comments of RCN Telecom Services, Inc., MB Docket 05-311 (Apr. 20,2007) ("RCN Comments").

long term. However, unlike Verizon and AT&T, who notwithstanding their professed support for competitive parity seek to preserve a competitive advantage at least until existing franchises expire or, in the case of AT&T until some other indeterminate time in the future, RCN and a number of other commenters showed why competitive parity requires that the same interpretation of what is reasonable must apply to all competitors in a market. Clearly, the principles and findings adopted the ***Order*** should apply to all competitors when a new entrant enters a market or at such time as the any franchise is up for renewal in markets where there are more than one franchised cable of OVS operator.

RCN also agrees with AT&T and Verizon that the Commission should specify that providers who operate regional networks should be able to demonstrate compliance with any LFA customer service standards based on aggregate performance data for the call center serving that area.

I. THE SAME REFORMS MUST AT A MINIMUM APPLY TO EXISTING CABLE OPERATORS AT THE TIME OF RENEWAL AND SHOULD APPLY WHEN A NEW ENTRANT ENTERS UNDER THE NEW RULES

The initial comments demonstrate that application of the ***Order's*** findings to existing providers is necessary to ensure competitive parity between existing franchisees and new entrants.[4] Without it, the Commission would be creating a significant governmentally mandated cost advantage for "new entrants" that are often highly capitalized and already have relationships with the vast majority of households in the market.[5] As noted by RCN and WOW, giving the telephone incumbents a governmentally-sanctioned cost advantage would be particularly ironic – and destructive to robust competition – in the case of existing "new entrants" like RCN, WOW and other competitive franchisees and OVS operators who would in effect be penalized for their

4 ***See*** note ***3***, *supra.*

5 ***See*** RCN Comments at 4; Charter Comments at **8;** TWC Comments at 7

efforts to enter the market and fulfill the competitive goals of Congress and the Commission while Verizon and AT&T were engaged in protecting their local telephone markets from competition.[6] Accordingly, the minimum condition necessary to assure the Commission's ***Order*** does not create disparity is to apply the findings to current franchisees and OVS operators at renewal.' **As** urged by Representatives Barton and Upton, the disparity in regulation should be quickly resolved because not extending the same relief to existing operators "handicap[s] them as compared to their competitors."'

The Commission's findings about the franchise fee cap and public, educational and governmental ("PEG") requirements must apply to **all** operators because, contrary to arguments that the findings were only based on Section 621,[9] the Commission's findings were also made in accordance with Sections 622 and 611.[10] The statutory provisions implementing the franchise fee cap" and the reasonable parameters for PEG requirements[12] do not – and should not – differentiate between cable operators depending on when the operator obtained a franchise. In addition, the Commission found that it has authority under Section 201(b), Section 303(r) and Section 4(i) to prescribe rules, including those about the franchise fee cap and PEG requirements.[13] **As** a result, the Commission findings about the franchise fee cap and the PEG

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6 See RCN Comments at 5-6; WOW Comments at 3-4.

7 As described in RCN Comments at fn. 12, the Commission should apply the same relief to OVS operators that typically have agreements with LFAs that mirror, in many respects, the cable franchise agreements.

Letter from Representative Barton and Representative Upton to Commissioner Martin, Apr. 24, 2007 (Attachment A).

9 See Comments **of** National Association **of** Telecommunications Officers and Advisors et al, MB Docket 05-311 (Apr. 20,2007) ("NATOA Comments"). RCN notes that as many **as 80** commenters supported NATOA's Comments.

10 ***Order*** at ¶¶ **98,** 103-104, 112; see *also,* Charter Comments at 10-11, NCTA Comments 15-19, and TWC Comments at 6-7.

11 47 U.S.C. § 542.

12 47 U.S.C. § 531.

13 RCN Comments at ***6***.

requirements must apply to all operators,[14] and Verizon's self-serving notion that what the Commission has now found to be unreasonable obligations should continue to apply to existing franchisees until the time of renewal because they "agreed to do more" must be dismissed. It is astounding that Verizon would even make such a statement – as one of the primary proponents of the Commission's ***Order***, Verizon clearly understands that one of the reasons for the "inordinate delay"[15] that it claimed to experience in seeking franchises is a result of the fact that LFAs, often bound by state "level playing field" statutes, and often threatened with litigation from incumbent cable operators, were seeking to impose the similar obligations on new entrants that essentially mirror the obligations imposed on existing franchisees. RCN, who clearly has considerably less bargaining power than Verizon, should clearly not be disadvantaged *vis a vis* Verizon because it "accepted" terms of the incumbent's franchise and didn't have the benefit of the Commission's ***Order*** to compel other terms.

As described in RCN's Comments, the Commission has the authority to apply the "fresh look" doctrine when (1) one of the parties to the contract has market power and has exercised that power to create long term contracts that create unreasonable barriers to competition and (2) the contractual obligations can be nullified without harm to the public interest.[16] Once the Commission determined that some franchise terms create unreasonable barriers to competition, the relief granted can only provide true competition, and thereby benefit the public, if it eliminates the unreasonable terms for all competitors. Otherwise, disparate imposition of additional franchise fee and PEG contribution costs on some competitors will impair the ability of consumers to realize the full benefits of the entry that the Commission's ***Order*** seeks to

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14 ***See*** Charter Comments at 5, NCTA Comments at 10, 15, 17, and TWC Comments at ***6***.

15 ***See,*** *e.g.*, Comments of Verizon on Video Franchising, MB Docket 05-311, at iv and ***6*** (Feb. 13, 2006).

16 RCN Comments at 7.

facilitate, since existing operators will have to recover the additional costs in their charges to consumers and, in addition, the new entrants will have less incentive to lower its rates than it would if its competitors were not subject to additional costs. As such, the "fresh look" doctrine must be applied to existing franchisees prior to renewal when a new provider enters a market and when the first franchise is up for renewal in markets where there are more than one franchised cable of OVS operator.

Although NATOA and others argue that local governments will be financially harmed if the Commission extends the ***Order's*** findings to existing franchisees, particularly prior to renewal,[17] greater harm will occur if the Commission does not extend the relief to existing franchisees. The very concern expressed by NATOA emphasizes the need to assure competitive parity since it underscores the fact that the amount of the disparity is not trivial, especially for a competitive provider such as RCN. Moreover, the presence of cable competition in a market, particularly by two or more facilities based providers, can be expected to cause overall penetration levels to increase as a result of service and rate competition and increased options for consumers. As a result, the 5 percent franchise fee will be applied to a greater revenue pool and will increase overall even though excess fees and other contributions that the Commission has found unreasonable will be eliminated. Moreover, given the pace of competitive entry, most LFAs will have a reasonable amount of time to adjust their budgets, to the extent it may be necessary, because the "fresh look" doctrine would only be applied in a limited context after the entry of a new provider.

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[17] NATOA Comments at 15-**16;** Comments of Greater Metro Telecommunications Consortium, MB 05-311 (Apr. 20, 2007), Comments of Towns **and** Cities of Abington, Massachusetts, et al, MB Docket No. 05-311 (Apr. 18,2007).

II. MULTI-JURISCTIONAL OPERATORS SHOULD NOT BE SUBJECT TO UNDULY BURDENSOME LOCAL CUSTOMER SERVICE REQUIREMENTS

Many LFAs impose customer service requirements on a franchise-specific basis, which can significantly affect a provider that offers service in multiple jurisdictions. Indeed, individual jurisdiction-by-jurisdiction reporting and service obligations can be burdensome for multi-jurisdictional operators like RCN because, as noted by other commenters, individual jurisdiction-by-jurisdiction customer service requirements can be inconsistent." **As** a result, regional or national operators that oftentimes have a call center the provides support for multiple services across multiple jurisdictions encounter obstacles in order to comply with all of the individual jurisdictional requirements. RCN therefore supports AT&T's and Verizon's request that the Commission specify that LFAs may not impose "disparate and potentially inconsistent quality of service standards and reporting requirements'' that can pose burdens on new entrants who have constructed or will construct their networks on a regional basis with a single headend and network structure, single rates and service offerings, centralized sales marketing and customer service centers, etc. It has been a costly, difficult and often less than precise for RCN to attempt to track operations on the basis of political geographic boundaries, and aggregate information concerning customer service levels across a regional system should be sufficient for an LFA to monitor compliance with service standards. Accordingly, RCN agrees with AT&T that "[a]t a minimum, providers like AT&T [and RCN] that operate regional networks should be able to demonstrate compliance with any LFA customer service standards based on aggregate performance data for the call center serving that LFA" area.[19]

[18] AT&T Comments at 5; Verizon Comments at 8-9.

[19] AT&T Comments at 5-6.

CONCLUSION

For the reasons stated herein and in RCN's Comments, the Commission should assure that consumers realize the full benefit of true competition without artificial, governmentally imposed cost differentials among operators by:

- Applying the "fiesh look" doctrine to existing franchise and open video system ("OVS") agreements at such time as a new entrant enters the market pursuant to the Commission's ***Order*** and prior to the time that either existing franchise is scheduled for renewal in order to eliminate impediments to competition and thereby promote consumer choice.

- Applying the "fiesh look" doctrine to an existing franchise when the first of any franchisee in a market becomes eligible for the relief granted in the ***Order*** since existing franchises rarely expire at the same time.

- Specifying that providers like AT&T [and RCN] that operate regional networks are able to demonstrate compliance with any LFA customer service standards based on aggregate performance data for the call center serving that LFA" area.

Respectfully submitted,

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ATTACHMENT A

ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives

Committee on Energy and Commerce

Washington, DC 20515-6115

JOHN D. DINGELL, MICHIGAN
CHAIRMAN

April 24,2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Martin:

Over the past few years it has become exceedingly apparent that the amount of competition in video, high speed Internet, and voice services is growing. Pro-competition policies are clearly working. The correct regulatory response, therefore, is to ensure free markets flourish, not to layer on additional, unnecessary, and burdensome regulations. We are disturbed that with respect to the cable industry, you appear to be making proposals that are leading the Commission precisely down the road of intrusive regulation when it is least justified.

For example, despite an earlier FCC staff report that *a la **carte*** regulations would reduce consumer choice and raise subscriber rates, as well as general rejection of the idea by economists and on Capitol Hill, you continue to advocate such regulation of cable operators' business models. You have advocated multicast must-carry, even though the FCC has already rejected it on more than one occasion because of policy and First Amendment concerns. You have expressed continued support for the integrated set-top box ban, which imposes additional costs without providing any benefits to consumers who are content to use a cable operator's set-top box. That point has repeatedly been made in wavier requests, a number of which the FCC Media Bureau has denied, but which the full Commission has yet to address.

While some of the statutory framework applicable to cable television is rooted in Communications Act provisions adopted in 1992 and 1996, when cable share of the multichannel video marketplace was much greater, the Commission has the authority—and the duty—to implement those provisions in a manner that reflects actual market conditions. Market conditions today bear little resemblance to those of 1992. According to FCC data, cable served 95.95 percent of the multichannel video programming distribution market in 1992. That dropped to 88.69 percent by 1996, and to 69.41 percent by 2005. By contrast, direct broadcast satellite share of MVPD homes has grown fram non-existent in 1992 to 4.92 percent in 1996 to 27.72 percent in 2005. In light of this data, one would think that the need for cable regulation should be decreasing, not increasing. Recent FCC actions finding effective competition to cable in many areas of the country, with other effective competition petitions still pending, further support the conclusion that the need for regulation should be decreasing. This makes all the more peculiar some of your statements calling for increased regulation of the cable industry.

Moreover, thanks to your good efforts on broadband deregulation and video franchise reform, large telephone providers are getting into the video game. And yet, that very video franchise reform order did not extend the same deregulation to existing cable operators, handicapping them as compared to their competitors until consideration of the issue in **an** item still scheduled for the future. **Our** hope is that you address that issue shortly, and that you grant deregulatory parity so that **all** cable operators, large and small, can operate on a fair playing field in the highly competitive video market, which **as** we speak is also seeing entry by wireless providers and Internet streaming services.

We raised these concerns at the March 14,2007, FCC oversight hearing. Yet since then, you continue to push *a la* ***carte.*** There are reports that you are contemplating re-imposing a 30-percent horizontal cable ownership cap despite **a 2001** federal appeals court decision finding that the FCC failed to justify that very number. You appear to be once again trying to resurrect multicast must-carry by combining it with a leasing proposal, You also are reported to be circulating a dual carriage proposal, which the FCC has also rejected before on multiple occasions. Furthermore, reports indicate that the dual carriage proposal also implicates the depioyrnent of cable set-top boxes into consumers' homes. That is something that not all consumers want, and a proposition made more expensive by the integrated set-top **box ban, as** discussed above. There are also suggestions that the dual carriage proposal may include tentative conclusions. Our hope is that **if** there must be yet another item seeking comments on dual carriage, **it** would do so in a neutral fashion, without suggesting conclusions in advance, and would consider a variety of options, as well **as** the implications of the integrated set-top box ban,

We respectfully request that you take our concerns into account as you continue your leadership at the FCC.

Sincerely,

Joe Barton
Ranking Member
Committee on Energy **and** Commerce

Fred Upton
Ranking Member
Committee on Telecommunications and the Internet

cc: Commissioner Michael J. Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell